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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

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NO. 76-5606

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LOUIS C. ACKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM THE COUNTY COURT AT LAW
NUMBER TWO, TRAVIS COUNTY, TEXAS

* * *

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S
MOTION TO DISMISS OR AFFIRM

* * *

March 30 , 1977

WILLIAM P. ALLISON
2500 Red River
Austin, Texas 78705

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

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* * *

Appellant submits this brief in opposition to Appellee's Motion to Dismiss or Affirm, pursuant to Rule 16(4) of the Revised Rules of the Supreme Court of the United States, in order to respond to Appellee's contentions that review of this case is available in the Texas Court of Criminal Appeals.

I.

Appellee relies upon cases in which the Texas Court of Criminal Appeals heard habeas corpus petitions challenging the constitutionality of ordinances on their face. Ex Parte Wilbur, 155 Tex. Crim. 21, 230 S.W.2d 540 (1950); Ex Parte Mittelstaedt, 164 Tex. Crim. 115, 297 S.W.2d 153 (1957). The sole question before this Court in the instant case is whether the Texas abusive language statute is unconsti-

tutional as applied to a situation like Appellant's.

This question was specifically ruled upon by this Court in Largent v. Texas, 318 U.S. 418 (1943), in conjunction with the Texas Court of Criminal Appeals decision in Ex Parte Largent, 162 S.W.2d 419 (Tex. Crim. App. 1942). These opinions clearly hold that Appellant, "...under Texas practice, apparently could test by habeas corpus the constitutionality on its face of the ordinance under which [he] was convicted but may not use that writ to test the constitutionality of the ordinance as applied...". Largent v. Texas, supra, at 421. Appellant has found no indication of any change in the law or policy since these decisions.

II.

Appellee contends that the letter from the trial judge constitutes a potential route for appeal to the Texas Court of Criminal Appeals. There is no authority in Texas case law or statute for a judge's re-sentencing Appellant three months after the original final judgment. Even if the judge were to so modify the sentence the Court of Criminal Appeals would have no authority to hear the case months past the actual date of sentencing on August 2, 1976.

III.

Appellant urges that his Jurisdictional Statement illustrates the substantial nature of the questions presented to this Court and the need for this Court's authoritative review of those questions. The very fact that defendants in most of these abusive language cases are likely to be fined in an amount less than the minimum required for review by the states' highest appellate courts makes the statute the sort that may never receive authoritative state court interpretation.

11

CONCLUSION

For the foregoing stated reasons, Appellant respectfully requests that this Honorable Court deny Appellee's Motion to Dismiss or Affirm.

Respectfully submitted,

SARA M. SIMPSON
Student Attorney

WILLIAM P. ALLISON
Attorney for Appellant

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